RECENT CASES.

APPEAL AND ERROR—DISMISSAL—COSTS.—STATE EX REL TAYLOR V. VANN, 37 S. E. 263 (N. C.).—*Held*, where, pending appeal from a judgment in favor of plaintiff in an action to recover an office, the term of office expired, rendering futile any further judgment, the appellate court will not determine the merits of the case merely to decide the costs of appeal, and will dismiss the appeal but will not dismiss the action.

The dismissal of the appeal is in accord with *Herring* v. *Pugh*, 125 N. C. 437, 34 S. E. 538, and *Commissioners* v. *Gill*, 126 N. C. 86, 35 S. E. 228, which declare that the Court will not determine the merits of a case simply to decide who must bear the costs. But the Court goes further and refuses to dismiss the action on the ground that the plaintiff had a just and lawful cause of action under the doctrine of *Hoke* v. *Henderson*, 4 Dev. 1, 15 N. C. 1, which holds an office to be private property. This is opposed to the doctrine of *Taylor* v. *Beckham*, 178 U. S. 576, 20 Sup. Ct. 900, 44 L. Ed., and of practically all the other States, which hold that office is an agency or trust.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—TREATMENT OF INEBRIATES.—MURRY V. BOARD OF COMMISSIONERS OF RAMSEY COUNTY, 84 N. W. 103 (Minn.).—An act provided that each county of 50,000 or more inhabitants should provide and maintain a private institution in which inebriates might be treated, reformed and cured. Commitment therein was by personal application, or that of some friend or kin, and the number was limited to one from each 10,000 of the county. *Held*, unconstitutional.

A similar act applying to the whole State was held invalid because it attempted to give more than constitutional powers to probate judges. *Foreman* v. *Commissioners*, 67 N. W. 207. The statute under consideration was designed to meet this objection, but it was held unconstitutional as being class legislation, for sectional acts, to be valid, must rest on some peculiarity plainly distinguishing the places included from those excluded. The Court held that the assumed difference between urban and rural drunkenness was not such a distinguishing characteristic. *State* v. *Cooley*, 58 N. W. 150; *State* v. *Ritt*, 79 N. W. 535. The statute at bar occasioned a great deal of adverse press comment through the West, and was popularly dubbed "The Minnesota jag law."

CONTRACTS—AGREEMENT TO RE-DELIVER NOTE—ACTION FOR BREACH.—LYLE V. MCCORMICK HARVESTING MACHINE CO., 84 N. W. 18 (Wis.).—Plaintiff, the maker of a note, gave the same to defendant, the payee, under an agreement that it was to be returned on the happening of a certain contingency. Before the event specified, the defendant transferred the note to a third party, who was unable to collect it on execution, as plaintiff had meanwhile become insolvent. Nevertheless, *held*, that the defendant was liable for conversion.

An interesting and somewhat novel defense was set up, *viz:* that the contract was in the nature of an indemnity and that therefore the defendant was

not liable until damage had been suffered by the compulsory payment of the note or execution thereon; however, the Court held that the breach of contract was complete and awarded as damages the full amount of the note. *Kohler* v. *Matiage*, 72 N. Y. 259; *Redfield* v. *Haight*, 27 Conn. 31. Mere insolvency of the maker does not necessarily render a note valueless. It was objected that the plaintiff might collect the judgment from the defendant and then not pay the note; but the Court said this danger might be averted by equitable counter-claim and cited with approval *Loosemore* v. *Radford*, 9 M. & W. 659, and *Johnson* v. *Britton*, 23 Ind. 105.

CRIMINAL LAW—EVIDENCE—COMPETENCY OF DIVORCED WIFE TO TESTIFY AGAINST HUSBAND.—STATE v. KODAT, 59 S. W. 73 (Mo.).—The defendant was indicted for a criminal assault upon a third person. Between the time of the assault and the trial the defendant's wife had obtained a divorce. At the trial the divorced wife testified against the defendant. *Held*, that such evidence was incompetent.

This decision seems at variance with the prevailing tendency of modern decisions. At common law, a husband or wife could not, with few exceptions, testify against the other in any legal proceedings. This being the case, the severance of the marriage relation would not remove the disqualification, and it was upon this ground that the decision was based. *State* v. *Raby*, 28 S. E. 490 (N. C.); *State* v. *Phelps*, 2 Fyler 374. The disqualification, however, now is generally restricted to confidential communications. The important consideration is the public convenience of getting at the truth in all cases. *Appeal of Robb*, 98 Pa. St. 501; *Westerman* v. *Westerman*, 25 Ohio St. 500; *Shouler*, *Husband and Wife*, 85.

DIFFERENCE BETWEEN CONDITIONS AND TERMS OF A WRITTEN INSTRUMENT—PAROL EVIDENCE AS TO EACH.—GALE MFG. CO. V. FINKELSTEIN, 59 S. W. 571 (Tex.).—The defendant gave the plaintiff's agent an unambiguous order for goods, in writing. Defendant offered evidence of a parol contemporaneous agreement, that the order should be sent by the agent to the plaintiff, and if not accepted and the defendant notified within thirty days, it was to be considered cancelled. The trial court admitted the parol evidence, over the defendant's objection, but the appellate court *held*, it was error to admit it as varying the terms of a writing by parol.

The appellate court fails to consider the distinction between the *conditions* and the *terms* of a written instrument. The condition on which an instrument is to become binding may always be shown by parol. In *McFarland* v. *Sikes*, 7 Atl. 408, the Supreme Court of Connecticut held parol evidence admissible to show that the condition of a promissory note was that defendant should appear before a grand juror on a certain day. The note was absolute on its face. The Court held that the defendant's appearanee was not a term of the contract, but a condition. So here, the ratification and notice to defendant was a condition, the performance of which gave the contract life, the nonperformance of which in thirty days rendered it a nullity. This rule and the distinction is recognized in *Benton* v. *Martin*, 52 N. Y. 570; *Watson* v. *Bowers*, 119 Mass. 383; *Sweet* v. *Stevens*, 1 R. I. 375; *Schindler* v. *Mulheiser*, 45 Ct. 153; *Westman* v. *Krinnweide*, 15 N. W. 255; and others.

DIVORCE—ALIMONY—FOREIGN JUDGMENTS—RES JUDICATA.—ARRINGTON V. ARRINGTON, 37 S. E. 212 (N. C.).—*Held*, under Federal Constitution (Art. 4, Sec. 1), declaring that full faith and credit shall be given in each State to the judicial proceedings of other States, a judgment for divorce, granting alimony, is *res judicata* and binding on the parties, and, when sued on, defendant cannot plead to the merits in the original action.

That alimony in a lump sum or past due is such matter of record as to come under this article of the Constitution is well established. It is stated that alimony, future as well as past, is such a matter of record, in *Barber* v. *Barber*, 21 How. 582, 16 L. Ed. 226, but, *contra*, *Lynde* v. *Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, holds that a decree for payment of alimony in the future lacks the conclusiveness to bring it under the Federal Constitution.

ELECTIONS—CITIZENSHIP—TREATY WITH SPAIN—CITIZEN OF PORTO RICO—REMOVAL TO UNITED STATES—RIGHT TO VOTE.—PEOPLE EX REL JUARBE V. BOARD OF INSPECTORS OF TWENTY-FOURTH ELECTION DISTRICT OF TWENTY-FIFTH ASSEMBLY DISTRICT OF BOROUGH OF MANHATTAN, 67 N. Y. Supp. 236. —The laws of New York require that a person, in order to be entitled to vote at a State election, must be a male citizen of the United States. The Constitution of the United States (Art. 14, Sec. 1) declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. The treaty of peace with Spain (Art. 9) provides that the civil rights and political status of the native inhabitants of the territory ceded by Spain to the United States shall be determined by Congress. *Held*, that relator, who was a native-born citizen of Porto Rico, and resided there until September, 1899, when he moved to the United States, and who had never been naturalized, was not a citizen of the United States within the meaning of the Federal Constitution, and hence not entitled to register as a voter.

Juarbe had renounced allegiance to Spain and "adopted the nationality of the United States," serving with the army of occupation in Porto Rico during the Spanish war. But he must also show that the United States adopted him as a full-fledged citizen, and this could only be, in this case, by a collective naturalization of the Porto Ricans. The right claimed by the relator depends upon express proof that the right of full citizenship was conferred, and it cannot be upheld on the broad claim that the Constitution follows the flag, or that in the United States there can be no subjects. The trial judge notes a difference between the case where life, liberty or property is sought to be taken away without due process of law, as required by the fundamental law of the land, and the case in bar, which rests merely upon a claim of privilege—which privilege has not been conferred as yet, as Congress has not acted.

INDICTMENT FOR PERJURY BY WHICH JUDGMENT OF ACQUITTAL WAS SECURED—RES ADJUDICATA—ANALOGY TO JUDGMENT SECURED BY FRAUD—COOPER V. COMMONWEALTH, 59 S. W. 574. For majority opinion, 51 S. W. 789 (Ky.). Cooper was acquitted of a charge of adultery. *Held*, that the judgment on the case was conclusive in his favor on a subsequent charge of perjury, alleging that he falsely and knowingly did swear that he had not carnal knowledge of the woman.

The decision is on the ground that the same facts were in issue between the same parties and the first judgment disposed of them. While the jury must have believed that he committed adultery to convict, yet the questions are not the same. The question in the latter case was, did he commit perjury, and the evidence was overwhelming that he did. While the judgment in the former case is a bar to a subsequent prosecution for adultery, it ought not to be for perjury. The second jury had evidence the first did not have, and should have been allowed to weigh it. No pretense is made that if the first judgment had been procured by fraud it would have been a bar. 5 *Greenl. Ev.*, Sec. 38; 1 *Whart. Cr. Law*, Sec. 546; 1 *Chitty Cr. Law*, 657. Why should it be when secured by a means infinitely more vicious; a means which aims a blow at the security of all justice. The authorities cited to support this decision are cases

where the facts were the same, but here was the additional fact that he had lied, abundantly proved, so that no violence need be done the doctrine of *stare decisis*.

LIFE INSURANCE—DEFENSE OF SUICIDE.—KNIGHTS TEMPLARS' AND MASONS' LIFE INDEMNITY CO. v. JARMAN, 104 Fed. 638.—A statute made suicide no defence to an insurance policy. *Held*, that suicide was used in its popular sense as comprehending all cases where the insured took his own life, whether while sane or insane. Sanborn, circuit judge, dissenting.

There is a long line of authorities that support the dissenting judge. *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121, is representative of that view, and it would seem that it is not entirely incorrect to apply a metaphysical solution to problems like the present. Technically, suicide certainly implies an element of volition. See *Hancock Mut. Life Ins. Co.* v. *Moore*, 34 Mich. 45.

LIMITATION OF ACTIONS—WHAT PREVENTS BAR OF STATUTE.—PHOENIX LUMBER CO. v. HOUSTON WATER CO., 59 S. W. 552 (Tex.).—Plaintiff commenced his suit on a contract, within prescribed time. Afterward he amended his complaint, making it an action in tort, claiming that the same facts would sustain either action. *Held*, complaint setting up tort not having been filed within six years was barred.

Bingham v. *Talbot*, 63 Tex. 273; *Salt Co.* v. *Heide*, 80 Tex. 349; *McLane* v. *Belvin*, 47 Tex. 502; and many other Texas cases are cited in support of the decision, but it is contrary to the purpose of the Statute of Limitations, which is to take away a remedy from those who do nothing toward the assertion of their rights within the prescribed time, and not to overreach by a mere technicality a man who commences to prosecute his suit but makes a mistake as to the proper form of action. In *Premo* v. *Lee*, 56 Vt. 60, plaintiff sued in his own name before the expiration of the statute, and this suit, it was held, removed the bar as to a suit subsequently brought in his name as assignee, which was the proper form.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—QUESTION FOR JURY.—GREAT NORTHERN RY. CO. v. KASISCHKE, 104 Fed. 440.—A railroad coal shed had chutes that tripped automatically and let the coal into the tender. On a certain occasion one of these chutes refused to work, and plaintiff, being ordered, pulled it out. The coal came upon him and injured him. *Held*, that although the plaintiff knew of the defect he did not as a matter of law assume the risk from the defective chute. Sanborn, J., dissenting.

The present question is a close one. The facts are such as to show some knowledge on the plaintiff's part of the defects in the chutes. That it was not absolute enough to take it out of the jury is not altogether clear.

PROCESS—NON-RESIDENT—ENTICING INTO STATE—OPPORTUNITY TO LEAVE.—OLEAN ST. RY. CO. v. FAIRMOUNT CONS. CO., 67 N. Y. Supp. 165.—The president of a foreign corporation went to New York at the invitation of a creditor of the corporation to confer with the latter concerning a settlement of a matter in dispute. On their first meeting the president expressed his inability to settle the claim at the time. At this juncture a process-server stepped up and served a summons on the president in the creditor's action on the claim. *Held*, even in absence of evidence of fraudulent enticement, the service should be set aside, as the creditor was bound to give the president a reasonable opportunity to leave the State after the termination of the conference.

This case goes one step further than those which hold that, in absence of crime, the courts will not permit such an unfair and inequitable method to enforce a civil process. *Snelling* v. *Watrous*, 2 Paige, Ch. 14; *Beacom* v. *Rogers*, 79 Hun. 220.

PHYSICIANS—PRACTICING WITHOUT LICENSE—OSTEOPATHY.—LITTLE V. STATE, 84 N. W. 248 (Neb.).—A man practiced osteopathy without complying with a statute establishing a State Board of Health and prohibiting the practice of "medicine, surgery and obstetrics" without a license. *Held*, liable to the penalty prescribed by the statute.

The practice of osteopathy consists principally in rubbing and kneading portions of the bodies and manipulating the limbs of patients to remove the cause or causes of disease. The Court, taking a broad view of the question at issue, sought to carry out the legislative intent and effect the object of the statute designed to protect the public. *State* v. *Buswell*, 58 N. W. 728, 24 L. R. A. 69. The judges could see no reason why osteopathy should be distinguished from "Christian Science" treatment, and accordingly followed *Eastman* v. *People*, 71 Ill. App. 236.

STREET RAILROADS—REMOVAL OF OBSTRUCTIONS—SHADE TREES.—MILLER V. DETROIT, Y. & A. A. RY. CO., 84 N. W. 49 (Mich.).—A street railway company, with the proper franchise to lay tracks, erect poles, etc., removed eleven shade trees without notice or compensation to owner. *Held*, liable for damages.

The Court followed the principle laid down in *Wyant* v. *Telephone Co.*, 47 L. R. A. 497, *viz:* that a telephone company has the right to cut out the branches of trees along the public highway. It held accordingly that, a street railway not being an additional servitude, the company may remove all obstructions, including shade trees, without compensation to the owner. *Wilson* v. *Simmons*, 36 Atl. 380; *Dodd* v. *Traction Co.*, 57 N. J. Law 482. However, as the abutting owner has the title to shade trees adjoining his premises (*Cooley, Torts*, 318, 372; *People* v. *Foss*, 80 Mich. 559), he must have notice to remove obstructing trees, and reasonable time, before the municipality or any corporation may proceed to do so. *Clark* v. *Dasso*, 34 Mich. 86; *Stretch* v. *Village of Cassopolis*, 84 N. W. 51. The defendant failed to give such notice and was accordingly held liable for damages.

TELEPHONE COMPANY—ACTION FOR NON-FEASANCE.—LEVIN ET AL V. SOUTHWESTERN TELEGRAPH & TELEPHONE CO., 59 S. W. 303 (Tex.).—The appellant was expecting an important message over the wires of the appellee company, and was waiting in appellee's office to receive the same. The appellant desired to leave the office for a short time, and left word where he might be found. While he was absent, the message came. The appellee knew of the importance of the message, but made no effort to get the appellant, in consequence of which the latter suffered great pecuniary loss. *Held*, no action would lie.

This case was decided as above on the ground that the appellee company had in no way agreed to serve the appellant in any capacity, nor to do anything for which it would be liable. The contract, if there was one, must have been inferential in character. Even granting this, no consideration was averred or proved, and hence no liability could attach. *Telegraph Co.* v. *Henry*, 87 Tex. 160; *Insurance Co.* v. *Davidge*, 51 Tex. 249; *Dodge* v. *Burdell*, 13 Conn. 170.

UNFAIR COMPETITION—SIMILARITY OF NAME.—ALLEN B. WRISLEY CO. v. IOWA SOAP CO. ET AL, 104 Fed. 548.—Complainant had for many years sold a soap called "Old Country Soap." Defendant made a soap named "Our Country Soap." *Held*, mere similarity of names did not constitute unfair competition.

It would be difficult to find two names that looked and sounded more alike than those in the present case. Were it only a matter of similarity of names, the case would seem to come under *N. K. Fairbank* v. *Central Lard Co.*, 64 Fed. 133, and the claim of the complainant be established. But the question of similarity as to wrappers is considered of greater importance, and there being no similarity in the wrappers the case is brought in line with *Lorillard Co.* v. *Peter*, 57 U. S. App. 565. It will be noted, however, that the cases that have been based on dissimilarity of wrappers were ones where there was also a dissimilarity of name. The present case extends the scope of such cases.

VARIANCE BETWEEN ALLEGATIONS IN THE INDICTMENT AND PROOF—WHAT MATTER OF DESCRIPTION MAY BE REJECTED AS SURPLUSAGE.—BOYD v. COMMONWEALTH, 59 S. W. 518 (Ky.).—Under an indictment charging that a horse stolen was "blemished on left eye," evidence that the stolen horse was blemished on the right eye was *held*, not a fatal variance.

This case is supported by *Cone* v. *Holland*, 7 Ky. Law Rep. 299, but it is hard to bring it within the common-law rule that where any matter of description is alleged, though unnecessarily, it cannot be rejected as surplusage, as such matter of description goes to determine the identity of the offense. Horses blind in a single eye, are not so rare but that a misdescription admits of considerable uncertainty. This view is supported by Story, J., in *United States* v. *Howard Fed. Cases* No. 15,403, where he says no allegation more or less particularly descriptive of the identity of that which is essential to the charge can be rejected as surplusage. In *Allenbrech* v. *People*, 1 Denis 80, a charge of stealing one woolen sheet was not sustained by proof that it was partly of wool and partly of cotton. So in stealing lumber, where the marks alleged are other than those proved. *State* v. *Noble*, 15 Me. 476; *Com.* v. *Wellington*, 7 Allen 299. All these cases hold to the cardinal rule of criminal pleading, that while a general description of the subject matter is sufficient, yet if the pleader descends to particulars the proof must exactly coincide with the allegations.